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IN THE

Supreme Court of the United States

October Term, 1963

No. 806

STEWART-WARNER CORPORATION,
Petitioner,

vs.

CANADIAN WESTINGHOUSE COMPANY LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Statement of the Case

For a more complete and accurate statement of the case than is set forth in the Petition (p. 3), the Court is respectfully referred to the statement made by the Court of Appeals in its decision. This is printed as Appendix A to the Petition, and the Court's statement of the case appears at pages 19 to 23.

Reasons for Denying the Writ

1. The Decision Below Is Not in Conflict With Applicable Decisions of This Court

The opinion of the Court below neither "overrules" nor has it "renounced" the case of *Chandler & Price Co.*

v. Brandtjen & Kluge, Inc., 296 U. S. 53 (1935) as Petitioner contends at page 7. The Court below distinguished *Chandler*, both on the facts and on the law. The Court pointed out in the paragraph beginning at the middle of page 24 of Petitioner's Appendix A, that the counterclaims of Canadian Westinghouse are so interwoven with the Stewart-Warner claim against the original defendant, Westinghouse Electric Corporation, and the latter's defenses thereto, that the issues should all be settled in one forum and in one suit.

The Court below distinguished the facts of the *Chandler* case by pointing out (App. A., p. 26) that the counterclaim in *Chandler* "in no way related to the patent claim of the plaintiff" and that "the original defendant in that case, as a solitary consumer of the allegedly infringing device, had no interest whatsoever in the controversy between the plaintiff and the intervenor, whereas here the defendant, as a distributor of the intervenor's equipment, and the intervenor have closely parallel and related interests". The close interest here is further shown by the Westinghouse 76% stock ownership of Canadian Westinghouse.

Another factual difference from *Chandler* is that Petitioner in the case at bar sought an injunction against intervenor in Prayer 1 of its Amended Complaint, (Appellant's App., p. 9) by asking for an injunction against "those controlled by Defendant" whereas in *Chandler* this Court specifically stated that "his bill does not make the intervener a party or allege aught against it" (296 U. S. at p. 59).

Thus, the decision in each case turns on the closeness of the relationship of the intervenor's counterclaims to the plaintiff's original claim and the defenses and counter-

claim of the original defendant, as well as on the extent of the interest of the original defendant in the intervenor's counterclaims. These factors vary from case to case.

On the law, the decision in the *Chandler* case, rendered in 1935, was based on an interpretation of the specific wording of old Equity Rule 30 which has not been in effect for the 25 years since the Federal Rules of Civil Procedure were adopted by the Supreme Court in 1938. The Second Circuit has in no way questioned the status of *Chandler* as an authoritative interpretation of the Equity Rules. It has not overruled *Chandler* in any way.[1]

Chandler was decided under a set of rules materially different in substance and in spirit from the F. R. C. P. here involved. The Court of Appeals pointed out (Pet. App. A., p. 26 and footnote 1) that the present Federal Rules, in Rule 13 on counterclaims, liberalized the practice to permit all related controversies between the parties to be placed in issue in one suit to obtain a speedy and just determination of the controversies. As Circuit Judge Medina remarked at the argument of this case below, the adoption of Petitioner's view would set back Federal practice by a generation.

There is no conflict with the decision of this Court in *Columbia Gas Corp. v. American Fuel Co.*, 322 U. S. 379 (1944). This case was decided *Per Curiam* without oral argument and based only on the jurisdictional statement and the briefs in support thereof and in opposition thereto. The only issue decided by the Supreme Court was that it had no jurisdiction to hear an appeal direct from a District Court under the Expediting Act in a bankruptcy

[1] Dissenting Judge Friendly did not base his dissent on conflict with *Chandler*. Apart from the issue of appealability (not raised in the petition here), Judge Friendly saw the case as involving only the narrow question as to whether, on the facts of this case, the trial judge abused his discretion in striking the counterclaims and defenses.

proceeding where one group of creditors (supported by the United States as an intervenor) claimed that another creditor had violated the antitrust laws and thus could not share in the assets of the bankrupt estate. The statement in support of which the *Chandler* case was cited was *dictum* only. A review of the briefs filed in the Supreme Court in the *Columbia Gas* case shows that no party cited the *Chandler* case, no party cited Rule 13, and no party made any argument with respect thereto. Thus, since the question of the effect of Rule 13 on the doctrine of the *Chandler* case was neither briefed nor argued before the Supreme Court, it cannot be said that this Court gave any consideration to the question which is in issue here, and there can be no conflict with the decision rendered here.

2. There Is No Conflict Between Decisions of Different Circuits

The two Courts of Appeals which have considered the question of the right of the intervening manufacturer of the accused device in a patent suit not only to defend against the infringement charge, but also to counterclaim under Rule 13 against the patent owner, are in accord that counterclaims may be brought to settle other controversies closely related to the complaint brought by the patent owner. The decision of the Second Circuit in the case at bar is in accord with the decision of the Seventh Circuit in *Switzer v. Locklin* (C. A. 7-1953) 207 F. 2d 483, cert. denied 347 U. S. 912. In view of the harmonious decisions in these two Courts of Appeals, each of which handles more patent litigation than any of the other nine Circuits, there is no reason to assume that any conflict between Circuits will arise in the future.

3. There Is No Question of Great Public Importance Nor Any Injustice to be Righted

In view of the factual distinctions from *Chandler* previously pointed out herein, it seems unlikely that this Court would ever reach the first question which the Petitioner alleges the case presents. Even if it did, the fact that only two cases (both in accord) involving this question have reached the Courts of Appeals in the 25 years during which the present Federal Rules have been in effect indicates quite clearly that the question is not a recurrent one of great importance in the administration of federal procedure.

The order appealed from is an interlocutory order dealing with procedure. The Court of Appeals merely held that the controversies relating to photo-electric line tracing devices between Stewart-Warner Corporation, on the one hand, and Westinghouse Electric Corporation and its subsidiary, Canadian Westinghouse Company Ltd., on the other hand, should be decided in one suit rather than in two suits. There is no reason to believe that the ultimate result will be any different where the whole controversy is decided in one suit in the District Court for the Western District of New York, than it would be if the controversy were split into two suits. In fact, the Court of Appeals said that its "disposition of this case does no more than aid in the effectuation" of the purpose of the Rules "to permit the speedy and inexpensive litigation of controversies and to maximize the expenditure of judicial resources" (Pet. App. A., p. 26). It is of no public importance that the issues be split into two suits rather than being tried in one. Indeed, the public interest lies the other way for reasons stated by the Court below.

The second question presented regarding venue is without substantial merit, it being clear that when Petitioner voluntarily came into the District Court of its own choosing, it waived its personal privilege to object to venue with respect to counterclaims. The opinion below so held (Pet. App. A., p. 27), with Judge Friendly using even stronger language saying that Petitioner's argument as to venue was "an argument so thoroughly blasted by the *General Electric* decision, *supra*, [287 U. S. 436, 435 (1932)] and many others that it ought not to have been made" (Footnote 2, p. 29, Pet. App. A). Thus, there is no substantial question as to venue to be decided.[2]

The two questions presented in the Petition (p. 2) could be rendered moot when there is a final decision on the merits in this case. If the lower courts should render a final decision on the counterclaims of Respondent in favor of Petitioner, there will be no need for the questions presented here ever to be decided by this Court.

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[2] While Petitioner cites Professor Moore's treatise in support of its contention, it fails to inform the Court that Professor Moore's conclusion on the point is in accord with the result reached by the Court below. See 3 Moore, Federal Practice 45.

CONCLUSION

For the three reasons stated, it is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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